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Just Cause or Just Because?

Prosecution and Plea-Bargaining
Resulting in Prison Sentences on Low-
Level Drug Charges in California and
Arizona

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Summary

Introduction

In 2000 and 1996, respectively, California and Arizona voters approved ballot initiatives that altered the prosecution of certain drug offenders and sought to make treatment more widely available. The voters were motivated by a mix of factors, including the perceived expense of incarceration, a desire to ensure imprisonment of violent offenders, the perceived harshness of drug sentences for low-level, particularly marijuana, offenders, and the lack of treatment availability for drug users. According to the California Legislative Analyst's Office, under Proposition 36 "an offender convicted of a 'nonviolent drug possession offense' would generally be sentenced to probation, instead of state prison, county jail, or probation without drug treatment."¹ In Arizona, the Drug Medicalization, Prevention and Control Act of 1996 (Proposition 200) established mandatory drug treatment for individuals convicted of possession or use of a controlled substance. Generally, both reforms were expected to divert minor, nonviolent drug offenders from incarceration (both jail and prison) to treatment. Although jailing of low-level drug offenders remains a major national issue, we focus here on offenders sentenced to

¹ California Legislative Analyst's Office, review of Proposition 36, http://www.lao.ca.gov/ballot/2000/36_11_2000.html, accessed on March 8, 2005.

prison for two reasons. First, the reform in California was expected to save far more resources (\$200 million to \$250 million) in prison costs than in jail costs (\$40 million).² Second, the consequences of a prison sentence are often more severe than the consequences of a jail sentence, as measured by impact on family, employment prospects, and other social functioning indicators.

Although the initiatives passed overwhelmingly in both states, little was known about drug offenders who received prison sentences other than their increasingly large share of the prison population. Prosecutors asserted that they were already treating such drug offenders fairly by making appropriate referrals to treatment and substantial use of plea-bargains. Prosecutors' patterns had not been carefully examined, so it was unknown whether low-level drug offenders in prison had a violent or lengthy criminal history that made prosecutors reluctant to drop the low-level drug charge, whether the quantity or type of drug involved influenced the prosecution pattern, and whether there were differences across racial groups in the prosecution of low-level drug offenders.

This study set out to fill in gaps in our knowledge about the prosecution of imprisoned low-level drug offenders and how such prosecutions might be affected by diversion reform initiatives. It was designed to assess what proportion of offenders had merely "smoked a joint" (that is, their true underlying drug crime was minor) and had no or minimal prior record (that is, they were first-time offenders) versus the proportion who had been charged with a more severe crime and engaged in plea-bargaining or who had a severe criminal record. Answering these questions is important because the ballot initiatives were generally intended to divert the former category of offender from the prison track, and the anticipated savings were expected to come from these diversions. To accomplish the aims of the study, we do the following:

² California Legislative Analyst's Office, review of Proposition 36.

- *Characterize the prosecution of drug possession and other low-level offenses relative to drug sales and other nonpossession offenses.* For example, do such offenders have extensive criminal histories?
- *Examine how marijuana is treated relative to other drugs.* Are marijuana cases being prosecuted “too harshly,” as some have argued?
- *Examine whether plea-bargaining practices are influenced by race.* If so, are certain racial groups more likely than others to receive more lenient or severe treatment by prosecutors?
- *Examine what factors influence plea-bargaining behavior and plea-bargaining outcomes.* Plea-bargaining is the standard and widely accepted process under which both prosecutors and offenders negotiate, typically to effect sentencing on a lesser offense relative to the offender’s initial arrest and filing charges. In accepting the plea-bargain, both sides forgo the uncertainty of a trial outcome—the prosecutor obtains a sure conviction and the offender avoids the possibility of a lengthier prison sentence.
- *Analyze whether Proposition 200 has brought about changes in drug prosecution patterns,* given Arizona’s longer experience with a reform initiative.

Study Design and Methodology

The definition of low-level drug offense for the California portion of the study was drawn from the language of Proposition 36 and modified to correct for, or incorporate, ambiguities, errors, and omissions. In Arizona, similar methodology was applied, resulting in a definition of “low level” that included drug possession, drug use, and paraphernalia offenses.

In California, the research team drew a sample from the more than 23,000 offenders imprisoned on low-level drug offenses from specified urban counties in 1998 and 1999, the last years of sentencing activities prior to the emergence of the Proposition 36 campaign in California. In Arizona, data were available electronically for the 4,931 low-level drug commitments that occurred between 1996 and

2000. This four-year span includes a period prior to and after implementation of Proposition 200.

For both California and Arizona, the researchers developed an offense severity index for past arrests and convictions, a criminal history index, and a measure of the plea-bargaining that occurred in the offender's case. The plea-bargaining measure was defined as the distance along the severity index between arrest charges and charges at conviction. The team also collected data on sociodemographic characteristics that might have influenced prosecution, including race, age, gender, employment status, and county. The type of drug was obtained from the prosecution records. In California, the quantity of drug could be obtained from records, but in Arizona the team had to utilize more general quantity measurements (for instance, "baggies" or "rocks").

Drug Prosecutions Resulting in Prison Terms in the Pre-Proposition Eras

Imprisoned Low-Level Drug Offenders in California

The California population consisted primarily of males who were unemployed at the time of their offense. Approximately one-third were black, one-third were Latinos, and almost one-third were white. Nearly 30 percent were on probation at the time of their offense. Almost 50 percent of the cases involved cocaine and fewer than 3 percent involved marijuana only. Approximately 7 percent originated at arrest as drug transportation or sale cases. Offenders had an average of 9.8 prior arrests and 3.9 prior convictions (with a sum severity score³ of 195 for prior offenses) in their record. Low-level drug offenders had an average of 3.4 charges filed by prosecutors and had received sentences averaging 29.4 months.

³ Each previous conviction offense is given a score from 1 (low severity) to 74 (high severity). The sum severity score for an individual is the total of these scores for each previous conviction. For the California sample, the offenders averaged 3.9 previous convictions with a sum severity score of 195. Thus, each of the 3.9 previous convictions had an average severity score of 50, which represents a relatively severe felony.

Key research findings include the following:

- Sixty-eight percent of those in prison on a drug sales charge had a previous drug conviction (78 percent had a previous conviction of some sort); 72 percent of those in prison on a non-sales charge had a previous drug conviction (98 percent had a previous conviction of some sort).
- Plea-bargaining from a drug sales charge to a non-sales charge was relatively rare: Only 11 percent of those convicted on non-sales charges had originally been charged with a drug sale or transport offense. This pattern did not differ across drugs, including marijuana.
- Cases involving large amounts of drugs (200 grams and over) were likely to start out and remain sales cases; instances involving smaller amounts either originated as sales cases but were disposed of as non-sales cases or originated and ended as non-sales cases. The median marijuana offender had 246 grams at arrest and the median cocaine offender had 46 grams at arrest.
- Imprisoned non-sales offenders had more severe criminal histories than imprisoned sales offenders. This finding holds true even when type of drug and county of prosecution are controlled for. On average, however, cocaine offenders had roughly twice as many criminal convictions in their history as marijuana offenders.
- By drug type, 60 percent of imprisoned marijuana offenders had a previous drug conviction of one sort or another (79 percent had a prior conviction of some kind). In contrast, 70 percent of cocaine offenders had prior drug convictions (97 percent of them had prior convictions of some kind).
- Drug type, but not race, seemed to influence charge reductions, with marijuana offenses most frequently resulting in a reduction.

Imprisoned Low-Level Drug Offenders in Arizona

In Arizona, 81 percent of low-level drug offenders were male. The majority were white, followed by Latinos and blacks. Seventy percent were unemployed at arrest. Nearly 60 percent were probationers.

About 13 percent of all imprisoned low-level drug cases were for marijuana, about 25 percent for dangerous drugs, about 33 percent for narcotic drugs, and about 25 percent for paraphernalia. Prior to Proposition 200, offenders had an average of 8.32 prior arrests and 17.1 prior offenses in their record (with a sum severity score of 671.5 for prior offenses).⁴ On average, low-level drug offenders in the weighted sample were sentenced to prison for 1.9 years pre-Proposition 200.

Key findings include the following:

- Drug quantities were not consistently and accurately recorded as part of the case files, but narratives from police arrest records indicate that the overwhelming majority of sale, transportation, and importation offenses appeared to involve large quantities.
- Most case adjustments took place from the time of arrest to prosecution. Offenders with more extensive and serious prior records were more likely to have the charges reduced. Conversely, the less extensive the prior record, the more likely offenders were to have charges added from arrest to prosecution.
- Between arrest and prosecution, marijuana offenders were less likely than other drug offenders to have a change in charges or in sum severity score.
- The number of charges from arrest to prosecution decreased for a larger percentage of Latinos convicted on marijuana and dangerous drug offenses than for whites and blacks. Charges were reduced for fewer blacks convicted of narcotic drug offenses than for other ethnic groups. White offenders experienced the most case adjustments.
- For probationers, most plea-bargaining activity took place from the time of the probation revocation to prosecution. Charges were more likely to decrease for probationers with the fewest and least severe criminal records. Conversely, charges were more

⁴ A single arrest can include multiple offenses.

likely to increase for probationers with more extensive and severe criminal records.

Factors Influencing Plea-Bargaining

California prosecutors first file the arrest charges and may also file additional charges and enhancements before plea-bargaining begins. Thus, negotiated reductions in charges occur between the filing of charges and sentencing. In Arizona, on the other hand, plea-bargaining occurs between the arrest and the filing of charges.

In California, age, drug type, county, and the number of charges filed were significantly associated with patterns in reduction of charges. Surprisingly, the number of prior convictions was not a significant factor in the likelihood of experiencing charge reductions.

In Arizona, charge severity scores tended to decrease more for males than for females, and charges were more likely to be decreased for employed offenders than for unemployed offenders. Higher rates of plea-bargaining or case adjustments were more likely in dangerous drug and paraphernalia cases than in marijuana cases. Cases with a drug sale charge at arrest were more likely to involve a charge severity score decrease; charge severity scores tended to decrease as the number of counts increased. Charge severity scores for offenders with more extensive prior records were more likely to decrease than to remain the same.

Summary and Policy Implications

Severity. The evidence supports the hypotheses of prosecutors that, prior to the implementation of Proposition 36 and Proposition 200, offenders convicted on low-level drug charges generally had more severe criminal histories, were involved with harder drugs (cocaine, heroin), or were caught with substantial quantities. The findings support prosecutors' contention that low-level offenders receiving prison sentences had more serious and extensive criminal histories than the "low-level" conviction label suggests.

In California, people imprisoned on non-sales charges (primarily possession) had more severe criminal histories than those imprisoned on sales charges, suggesting that criminal history is an aggravating

factor that helps equalize the severity of sales and non-sales offenses in the eyes of the law. In Arizona, low-level offenders were arrested with relatively large quantities of drugs and allowed to plead down to low-level offenses, distorting the true nature of low-level drug offenders in prison.

Marijuana Offenders. The treatment of marijuana offenders is less clear. In California, the small number of marijuana offenders generally had less severe criminal histories (as measured by the number of arrests and convictions and the severity score of arrest charges and convictions) but larger quantities of drugs. Thus, quantity may be playing a role in increasing the severity with which marijuana offenders are being treated.

Although there were proportionately few marijuana offenders in Arizona, marijuana cases were also characterized by offenders' extensive and severe criminal history records. Arizona marijuana offenders averaged 10 prior arrests and 17 prior offenses. A qualitative review of drug quantities shows that a substantial percentage (about 17 percent) of Arizona's low-level drug offenders were originally arrested for offenses that included sales, transportation, and importation of drugs. These findings depict an imprisoned population with far more severe drug offenses than the one portrayed in prior studies. Taken together, they serve as evidence that marijuana offenders are not first- or second-time offenders and are not treated more "harshly" or more "leniently" than other drug offenders.

Race/Ethnicity. A bivariate analysis of pre-Proposition 200 data in Arizona shows that race and ethnicity played a role in charging decisions, with whites having more case adjustments than blacks or Latinos. However, once multivariate analyses were conducted, the race effects disappeared and there were no racial/ethnic disparities in plea outcomes prior to Proposition 200. Gender, employment status, and legal criteria (e.g., drug sales, paraphernalia cases, dangerous drugs, and prior record) were the significant predictors of plea outcomes.

Did Prosecution Patterns Change After Ballot Reform in Arizona?

At the time the research was funded, a before-and-after examination of the initiative's effects was possible only in Arizona. In Arizona, we examined the following questions: (1) Were offenders' prior records more severe and lengthy after enactment of the proposition? (2) What was the overall prevalence of plea-bargaining? (3) Did sale and paraphernalia charges have a direct influence on plea outcomes post-Proposition 200? Concerning the first question, we would expect a reduction in the overall severity of offense indices for incarcerated offenders because Proposition 200 excludes violent offenders. The second question addresses whether offenders no longer see treatment as an incentive to plead and are now less willing to accept a plea to dispose their cases. The third question was examined to see if sale charges increased and produced more severe plea outcomes. We also tested whether paraphernalia charges increased post-proposition 200 as a new mechanism to encourage plea-bargain opportunities.

Findings

After Proposition 200, the proportion of females and blacks and the proportion of paraphernalia cases in the imprisoned population increased, whereas the proportion of marijuana and probation offenders decreased. Key analytic findings include the following:

- Except for paraphernalia cases, charges were more likely to decrease in the post-Proposition 200 environment, regardless of drug type.
- Post-proposition data show that offenders' prior records were more extensive and severe in nature and less varied across the range of severity scores. In the plea-bargaining phase, severity scores were more likely to decrease pre-Proposition 200.
- Although it is difficult to assess whether prosecution patterns changed by race after implementation of Proposition 200, the data do indicate that Latinos were treated more severely than

other racial/ethnic groups, a finding that must be caveated by the small number of cases for this comparison.

Policy Implications

Prosecution and sentencing patterns changed in Arizona after passage of Proposition 200. Offenders incarcerated after Proposition 200 had more extensive and severe criminal records. Evidence of post-Proposition 200 “hardening” in the processing of low-level drug offenders is reflected in the finding that the proportion of prosecuted and imprisoned drug cases involving paraphernalia cases increased after Proposition 200. The uncertainty regarding how paraphernalia cases should be processed—at least until Arizona’s Supreme Court decides the issue—may be the reason for such an increase. (Some jurisdictions treated paraphernalia cases as eligible for treatment under the new law; others excluded them altogether.)

Our data analysis reveals that, after Proposition 200, the more extensive an arrestee’s criminal history, the more severe the charges were likely to be. Thus, a prior record may now serve to enhance rather than reduce punishment (the latter was the case prior to the implementation of the proposition). Interestingly, the proportion of marijuana offenders not only decreased after implementation but those offenders were also far less likely to have an increase in severity from arrest to sentencing. Post-proposition prosecutorial decision-making processes appear to be characterized by decreased severity for marijuana cases, increased severity for paraphernalia cases, and increased severity for cases with extensive prior records.

Some have argued that the marked increase in the prosecution and incarceration of paraphernalia offenders after Proposition 200 was a way to circumvent the intent of the proposition. However, incarcerated paraphernalia offenders share many of the same characteristics of other low-level drug offenders—they have extensive criminal histories. In sum, it does not appear that new prosecution practices after Proposition 200 had the effect of blocking the diversion to treatment of drug offenders or resulted in the incarceration of large numbers of nonserious offenders.

Lessons from California and Arizona

This study set out to fill in gaps in our knowledge about the prosecution of imprisoned low-level drug offenders. What are the characteristics of low-level drug offenders who end up in prison? What is the role of plea-bargaining and what factors affect it? Do outcomes vary systematically by race and ethnicity? Finally, what effect did passage of Proposition 200 in Arizona in 1996 have on drug prosecution and imprisonment?

Plea-bargaining for drug offenses that result in prison sentences appears to be used in a manner consistent with prosecutorial practices aimed at incarcerating drug offenders who are perceived to present a greater threat to the community due to criminal involvement or involvement in more serious forms of drug offenses. In our samples, the low-level drug offenders in prison are often much more serious offenders than the “low-level” label implies. Indeed, imprisoned low-level drug offenders tend to have criminal histories reflecting their involvement in a variety of criminal offenses, cases involving large quantities of drugs, or both.

Additionally, given that the pathway to incarceration for the majority of Arizona’s low-level drug offenders is probation, there is a need for additional research to examine the decisionmaking practices that lead to probation revocation and incarceration. Research will need to go beyond the prosecution function and examine the role of probation officials in making those decisions as well as the decision-making processes that lead to chain of events culminating in the incarceration of low-level drug offenders.